KORAKYAT PLANTATIONS SDN BHD

v.

TAN SIEW EE & ORS

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: W-02-580-2003]
23 APRIL 2005

COMPANY LAW: *Arrangement, scheme of - Application to amend - Applicants were classified as 'disputed purchasers' with the result that they were excluded from scheme - Whether classification incorrect - Whether evidence proved applicants were bona fide purchasers for value - Whether validity of sale and purchase agreements proven - Whether s. 293 Companies Act 1965 read with s. 52 Bankruptcy Act 1967 inapplicable - Whether learned judge was right in allowing application - Companies Act 1965, s. 176*

COMPANY LAW: *Winding-up - Undue preference - Whether s. 293 Companies Act 1965 read with s. 52 Bankruptcy Act 1967 applicable*

A winding-up order was granted against the appellant based on a winding-up petition filed in court by Alliance Bank Malaysia Berhad ('ABMB') followed by the appointment of liquidators. The liquidators obtained a court order to hold a meeting for a proposed scheme of arrangement ('proposed scheme') between the appellant and its creditors pursuant to s. 176 of the Companies Act 1965 ('the Act'). A majority representing more than three-fourths of creditors present voted and agreed to the proposed scheme. The liquidators applied to the court to sanction the proposed scheme. The respondents, unhappy with the proposed scheme, applied successfully to the court for leave to intervene. They did not agree with the fact that the liquidators had classified them as "disputed purchasers" in respect of 20 lots of factory units ('the said lots') purchased by them from the appellant with the result that they were excluded from the proposed scheme. The liquidators in fact proposed or intended to transfer the lots to ABMB with the purpose of settling the appellant's debts for the redemption of a bridging loan taken by the appellant with the said bank. It was the position of the liquidators that the said lots were the subject of sale and purchase agreements the status and validity of which were uncertain having regard to s. 293 of the Act. Further, the fact that the sale and purchase agreements in respect of the said lots were entered

into to set off alleged antecedent debts within 5 years before the appellant was wound up were rendered void by virtue of s. 52 of the Bankruptcy Act 1967. The learned judge found the respondents *bona fide* purchasers for value and that the sale and purchase agreements were valid. This was compounded by letters of undertaking issued to the respondents by the director of the appellant, one Tan Seng Chai whom the liquidators had alleged had a "relationship of sibling" with the 1st and 2nd respondents. Accordingly, the learned judge granted the orders in favour of the respondents and sanctioned the proposed scheme subject to the said orders. Hence the appellant's appeal.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

[1] The evidence clearly showed that the respondents as purchasers entered into sale and purchase agreements with the appellant to purchase the said lots. The appellant issued receipts acknowledging that the respondents paid 10% of the purchase price for each lot purchased. The appellant further undertook *vide* letters of undertaking to transfer the said lots to the respondents free from any encumbrances as a total set-off against loans taken by the appellant from the respondents. The letters of undertaking further stated that upon execution of the sale and purchase agreements, the purchase price was deemed paid. The liquidators had not substantiated their allegation that there was a relationship of sibling between the said Tan Seng Chai who signed those letters and the 1st and 2nd respondents. Further, there was no relevance of that allegation in view of s. 20(1) of the Act. Based upon the material before the court, the said Tan Seng Chai had the capacity or power to act on behalf of the appellant in respect of the transactions. (pp 593 e-g & 594 a-b)

[2] The respondents by virtue of the sale and purchase agreements proved that they purchased the said lots and gave valuable consideration. The letters of undertaking clearly spelt out that the appellant unconditionally agreed that it would transfer/assign the said lots free of any encumbrances or claim as a total set off against the loan taken. That tantamount to an admission by the appellant that it had received valuable consideration from the respondents concerned. (p 594 c-e)

[3] Since the respondents had given valuable consideration, it would be unfair on the part of the liquidators to exclude them from the proposed scheme. The respondents acted in good faith in purchasing the said lots and hence were *bona fide* purchasers. Section 293 of the Act pertaining to fraudulent preference and s. 52 of the Bankruptcy Act 1967 were inapplicable under the circumstances of the case. (p 594 f-g)

[4] The sale and purchase agreements were valid transactions. The appellant never disputed them prior to it being wound up. Each agreement was properly stamped, witnessed and attested to by solicitors. There was nothing to show that the respondents did not act in good faith. (p 595 a-b)

[5] Since it was the liquidators' position that the sale and purchase agreements were invalid, it was for them to prove as such which they failed to do. They had not shown that the respondents were not purchasers in good faith or that the transactions were entered into without valuable consideration on the respondents' part as purchasers. As such, the liquidators could not simply confiscate the respondents' rights as unsecured creditors. The burden of proof as required by s. 52 of the Bankruptcy Act 1967 rested with the liquidators and the liquidators failed to discharge the burden. (p 595 d-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Suatu perintah penggulungan telah dikeluarkan terhadap perayu berdasarkan petisyen penggulungan yang difailkan di mahkamah oleh Alliance Bank Malaysia Berhad ('ABMB'). Ini dikuti oleh perlantikan penyelesai. Penyelesai kemudian memperoleh perintah mahkamah bagi mengadakan perjumpaan di antara perayu dan pemiutang-pemiutang bagi membincangkan skim cadangan ('skim cadangan') di bawah s. 176 Akta Syarikat 1965 ('Akta'). Suatu majoriti yang mewakili tiga perempat dari pemiutang-pemiutang yang hadir telah mengundi dan bersetuju dengan skim cadangan. Responden, yang tidak berpuas hati dengan skim cadangan, telah mendapat kebenaran dari mahkamah untuk mencelah. Responden tidak bersetuju dengan panggilan "disputed purchasers" yang diberikan oleh penyelesai kepada mereka berhubung dengan 20 lot bangunan kilang ('lot-lot') yang dibeli oleh mereka dari perayu, yang berakibat mereka telah dikeluarkan dari skim cadangan. Penyelesai malah telah mencadangkan atau berhasrat untuk memindahkan lot-lot kepada ABMB dengan tujuan untuk menyelesaikan hutang perayu berkaitan suatu 'bridging loan' yang diambil oleh perayu dari bank tersebut. Menurut penyelesai, lot-lot adalah menjadi subjek perjanjian jual beli, di mana tiada kepastian tentang status berdasarkan peruntukan s. 293 Akta. Selain itu, fakta bahawa perjanjian jual beli lot-lot tersebut bagi melunaskan hutang terdahulu telah dimeterai dalam

masa lima tahun sebelum perayu digulung telah menjadikannya tak sah di bawah s. 52 Akta Kebankrapan 1967. Yang arif hakim mendapati responden sebagai pembeli *bona fide* dengan nilai dan perjanjian jual beli sebagai sah. Ini diperkuatkan oleh surat-surat akujanji yang diberikan kepada responden oleh Tan Seng Chai, seorang pengarah perayu, yang dikatakan oleh penyelesai sebagai mempunyai "hubungan adik beradik" dengan responden pertama dan kedua. Yang arif hakim, dengan itu, telah membuat perintah-perintah untuk responden dan membenarkan skim cadangan tertakluk kepada perintah-perintahnya itu. Perayu telah merayu.

Diputuskan (menolak rayuan)

Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

[1] Keterangan menunjukkan bahawa responden telah memeterai perjanjian jual beli dengan perayu bagi membeli lot-lot tersebut. Perayu telah mengeluarkan resit yang menunjukkan bahawa responden telah membayar 10% harga belian bagi setiap lot yang dibeli. Perayu juga berjanji, melalui surat-surat akujanji, untuk memindahkan lot-lot kepada responden bebas dari semua sekatan, sebagai bayaran sepenuhnya pinjaman yang diambil oleh perayu dari responden. Surat-surat akujanji juga menyatakan bahawa harga belian dianggap sebagai telah dibayar sebaik sahaja perjanjian dimeterai. Penyelesai tidak menyokong dakwaan mereka bahawa wujud hubungan adik beradik di antara Tan Seng Chai yang menandatangai surat-surat dengan responden pertama dan kedua. Selain itu, dakwaan tersebut adalah tidak relevan dengan mengambil kira s. 20(1) Akta. Berdasarkan kepada material yang ada di hadapan mahkamah, Tan Seng Chai mempunyai autoriti atau kuasa untuk bertindak bagi pihak perayu berkaitan dengan transaksi-transaksi.

[2] Melalui perjanjian jual beli, responden telah membuktikan bahawa mereka telah membeli lot-lot dengan balasan yang bernilai. Surat-surat akujanji jelas menyatakan bahawa perayu bersetuju tanpa syarat untuk memindahkan/menyerahhak lot-lot bebas dari sebarang sekatan atau tuntutan sebagai suatu 'set-off' yang penuh terhadap pinjaman yang diambil. Ini adalah pengakuan perayu bahawa ia telah menerima balasan bernilai dari responden.

[3] Oleh kerana responden telah memberikan balasan yang bernilai, adalah tidak adil bagi penyelesai untuk mengenepikan mereka dari skim cadangan. Responden telah bertindak secara jujur dalam membeli lot-lot dan kerana itu mereka adalah pembeli-pembeli *bona fide*. Seksyen 293 Akta berkaitan dengan 'fraudulent preference' dan s. 52 Akta Kebankrapan 1967 adalah tidak terpakai kepada halkeadaan kes di sini.

[4] Perjanjian jual beli adalah merupakan transaksi-transaksi yang sah. Hakikat ini tidak dipertikai perayu sebelum ianya digulung. Setiap perjanjian juga telah disetem dengan teratur dan disaksi dan diperaku oleh peguamcara. Tiada apa pun yang menunjukkan bahawa responden tidak bertindak dengan suci hati.

[5] Oleh kerana penyelesai yang mengambil pendirian bahawa perjanjian adalah tak sah, maka mereka memikul beban untuk membuktikan dakwaannya itu. Ini gagal dilakukan oleh penyelesai. Mereka tidak menunjukkan bahwa responden bukan pembeli *bona fide* atau bahawa transaksi-transaksi telah dimeterai tanpa balasan yang bernilai dari responden selaku pembeli. Penyelesai, dengan itu, tidak boleh merampas hak responden sebagai peminjam tak bercagar. Beban bukti sepertimana yang dikehendaki s. 52 Akta Kebankrapan 1967 terletak atas penyelesai dan beban ini gagal dilangsaikan oleh mereka.

Case(s) referred to:
Official Assignee v. Ngu Ung Yong [1988] 2 MLJ 204 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 52
Companies Act 1965, ss. 20(1), 176, 236(3), 279, 293, 305(1)
Companies (Winding-Up) Rules 1972, r. 7
Contracts Act 1950, s. 91
Evidence Act 1950, s. 91

For the appellant - Michael KT Chow (Sylvia Cotter with him); M/s Logan Sabapathy & Co
For the 1st & 2nd respondents - Balasekaran Suppiah (Yae Khoon Chin & Wan Amir with him); M/s Yae, Lau & Partners
For the 3rd-9th respondents - Syed Faisal (Mohd Yamin with him); M/s Syed Faisal Kumar & Co

[Appeal from High Court, Kuala Lumpur; Originating Petition No: D5-26-15-2003, Companies Winding-Up No: D3-28-105-2000, Originating Petition No: D8-25-8-2003, Originating Motion Nos: D8-25-9-2003 & D8-25-10-2003]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Ghazali Yusoff JCA:

These five matters were heard together in the court below. They are as follows:

(i) Winding-up Petition No. D3-28-105-2000;

(ii) Originating Petition No. D3(D5)-26-15-2003;

(iii) Notice of Motion No. D8-25-8-2003;

(iv) Notice of Motion No. D8-25-9-2003;

(v) Notice of Motion No. D8-25-10-2003.

The chronology of events in these proceedings are as follows:

(a) on 3 February 2000, a winding-up petition (Winding-up Petition No. D3-28-105-2000) was presented against the appellant, Korakyat Plantations Sdn Bhd by Alliance Bank Malaysia Berhad (ABMB) and on 10 May 2000, a winding-up order was granted against the appellant and liquidators were appointed;

(b) on 29 October 2002, on the application of the liquidators, the court granted an order for the holding of a meeting of a proposed scheme of arrangement between the appellant and its creditors pursuant to the provisions of section 176 of the Companies Act 1965 (the Act);

(c) the meeting was held on 20 December 2002 and a majority in number representing more than three-fourths in value of the creditors present and voting at the meeting agreed to the proposed scheme of arrangement (hereafter referred to as "the proposed scheme");

(d) on 19 February 2003 the liquidators filed a petition (Originating Petition No. D3(D5)-26-15-2003) to obtain the approval of the court to the proposed scheme (hereafter referred to as "the sanction proceedings").

The respondents to this appeal were subsequently given leave to intervene in the sanction proceedings.

On 10 March 2003 the 3rd and 4th respondents filed an application (Notice of Motion No. D8-25-8-2003) made pursuant to s. 279 of the Act and r. 7 of the Companies (Winding-Up) Rules 1972 to move the court for, *inter alia*, the following orders:

(i) that the proposed scheme be amended as follows:

(a) that the words "Settlement Units" and its definition as appearing in the explanatory statement in Part B to the proposed scheme be deleted; and

(b) that lot PTM 13 appearing in Schedule B to the proposed scheme entitled "Particulars of Settlement Units" be deleted as a "Settlement Unit";

(ii) that the liquidators be restrained from entering into any dealing with lot PTM 13.

The words "Settlement Units", defined in Part B read as follows:

> The 26 or such units from the Project which the Company may with the agreement of ABMB select, and, which shall have a cumulative notional value of RM6,809,000.00, to be transferred to ABMB as full and final settlement of ABMB's claim. The particulars of the said 26 units are contained in Schedule B to the Explanatory Statement.

On the same date, ie, 10 March 2003 the 5th and 6th respondents filed a similar application (Notice of Motion No. D8-25-9-2003) in relation to lot PTM 69 appearing in Schedule B to the proposed scheme be deleted as a "Settlement Unit". Simultaneously the 7th, 8th and 9th respondents also filed a similar application (Notice of Motion No. D8-25-10-2003) in relation to 15 of the lots appearing in Schedule B to the proposed scheme, namely, lots PT 155, PT 196, PT 223, PT 238, PT 239, PTI 1, PTI 2, PB 27, PB 28, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67 and PTM 68 be deleted as "Settlement Units".

On 12 March 2003, the 1st and 2nd respondents, in relation to lots PTM 36, PTM 38 and PTM 39 appearing in Schedule B to the proposed scheme filed their respective notices of motion (encls. 29 and 32) and prayed for, *inter alia*, the following orders:

(i) leave to intervene in these proceedings;

(ii) leave to commence proceedings against the liquidators pursuant to ss. 236(3) and 305(1) of the Act; and

(iii) leave to vary or modify the proposed scheme pursuant to s. 279 of the Act.

The total of 20 lots described above forms the subject matter of these proceedings.

The facts showed that the appellant was incorporated as an investment holding company on 12 September 1985 with a paid up capital of RM1 million. At all material times the appellant was involved in the development of a project which is a mixed commercial and light industrial development consisting of 478 lots of factory units. The project is located on several pieces of land and form the sole asset of the appellant. Of the 478 lots, 407 lots have been disposed of to purchasers pursuant to sale and purchase agreements entered into with the appellant. Of the remaining 71 lots, 68 lots are the subject of sale and purchase agreements and 3 lots remain unsold.

It is the liquidator's position that the 20 lots in issue are the subject of sale and purchase agreements the status and validity of which are uncertain having regard to the provisions of s. 293 of the Act. Section 293 entitled "Undue preference" reads:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be:
>
> (a) in the case of a winding up by the Court:
>
> (i) the date of the presentation of the petition; or
>
> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier, and
>
> (b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

In relation to the implementation of the project the appellant obtained a bridging loan from ABMB. Pursuant to such a facility, the appellant granted ABMB a debenture creating a fixed and floating charge over its assets. Sometime in 1998 the appellant defaulted on the said facility with the result that ABMB appointed a receiver and manager pursuant to the said debenture. Subsequently, the appellant was wound up on 10 May 2000 and the liquidators were consequently appointed. At the date of the winding-up, the amount claimed by ABMB was RM9,993,790.08.

The liquidators have ascertained that apart from the secured debt of ABMB, the principal creditors of the appellant are the purchasers whom the liquidators have classified as unsecured creditors together with other unsecured creditors which comprise essentially the main contractor for the project.

The liquidators have formulated the proposed scheme to allow the completion of the project in order that the participating purchasers may obtain the benefits of their previous sale and purchase agreements with the appellant and also to achieve a more advantageous distribution for the general body of creditors for an orderly winding down of the appellant's affairs. ABMB had on 15 August 2002 consented to the proposed scheme.

The court convened meeting ("the said meeting") was held on 20 December 2002. Although the total number of participants at the said meeting was 407, 60 of them were not accepted as purchasers having regard to s. 293 of the Act. The appellant and the purchasers achieved the statutory approvals at the said meeting. The appellant subsequently applied to court and prayed for, inter alia, that the proposed scheme may be sanctioned by the court so as to be binding upon the appellant and the purchasers, ie, the sanction proceedings. As stated earlier, the respondents were given leave to intervene in the sanction proceedings.

The only issue raised by the respondents was whether the liquidators were correct in classifying them as "disputed purchasers" as defined in the proposed scheme with the result that they were excluded from the same. The liquidators' position is that the respondents have been treated as "disputed purchasers" because:

(a) each of their alleged sale and purchase agreements were entered into to purportedly set off debts allegedly due from the appellant to their goodselves when, amongst other things, no proof whatsoever has been presented to support the existence of such alleged debts;

(b) alternatively, even if such debts did exist, such set off arrangement would breach the provisions of s. 293 of the Act read with s. 52 of the Bankruptcy Act 1967 which would render the respective sale and purchase agreements void.

Section 52 of the Bankruptcy Act entitled "Avoidance of voluntary settlement" reads:

(1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Official Assignee, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Official Assignee, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the Official Assignee.

The learned judge found that the respondents are *bona fide* purchasers for value and hence ruled that the liquidators were wrong in fact and in law in classifying each of the respondents as disputed purchasers as defined in and for the purposes of the proposed scheme. He found that the respondents had proved that they entered into valid sale and purchase agreements before the appellant was wound up. The learned judge also found a "letter of undertaking" dated 12 July 1995 and issued by Tan Seng Chai, a director of the appellant to, *inter alia*, the 1st and 2nd respondents supported their contention. That letter read:

KORAKYAT PLANTATIONS SDN. BHD.
(Company No: 144726-A)

Date: 12th July 1995

Tan Siew Yong
Tan Siew Lee
Tan Siew Ee
All of
No.416, 2 _ Miles
Jalan Ipoh
51200 Kuala Lumpur

Dear Madam,

Re: Contra of building units in Taman Perindustrian Subang Mewah in repayment of a loan taken from you.

Contra Unit No: PTM 38, PTM 39, PTM 36

We hereby confirm that we have earlier taken a friendly loan from Tamra Business Machines Sdn. Bhd. In the sum of RM432,000.00 (Ringgit Malaysia Four Hundred and Twenty Three Thousand Only) to enable us to meet substantial preliminary expenses connected with the above project.

As agreed, we will transfer/assign the above units of property free of any and whatsoever encumbrances /or claim by us, as a total set-off against the loan taken from you.

As evidence of your entitlement to the above properties, you will execute and be bound by the terms and conditions of the standard sale and purchase agreement, applicable for the above project Save and Except that upon your execution, the purchase price shall be deemed fully paid.

Yours faithfully,

(Sign.)

Tan Seng Chai
Director.

The learned judge was of the view that since the respondents are *bona fide* purchasers for value, s. 293 of the Act and s. 52 of the Bankruptcy Act 1967 are not applicable under the circumstances.

The evidence also showed that a similar "letter of undertaking" was issued to the 7th, 8th and 9th respondents. That letter read:

KORAKYAT PLANTATIONS SDN. BHD.
(Company No: 144726-A)

Date: 12th July 1995
Tan Seng Yong
(NRIC No: 4261085)
Tan Seng Gee
(NRIC No: 56644514)
Koh Chong Kiaw
(NRIC No: 8158527)

all of
No. 11 & 11A, Jalan Perisai
Taman Sri Tebrau
80050 Johor Bahru
Johor Darul Takzim

Dear Sirs,

Re: Contra of building units in Taman Perindustrian Subang Mewah in repayment of a loan taken from you.

Contra Unit No. PB 27, PB 28, PT 155, PT 196, PT223, PT238, PT 329, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67, PTM 68, PT 1, PT 2.

We hereby confirm that we have taken a friendly loan from Mr. Tan Seng Yong in the sum of RM1,180,000.00 (Ringgit Malaysia One Million One Hundred and Eighty Thousand Only) and from Mr. Tan Seng Gee in the sum of RM 418,000.00 (Ringgit Malaysia Four Hundred and Eighteen Thousand Only) to enable us to meet substantial preliminary expenses connected with the above project.

As agreed, we will transfer/assign the above units of property free of any and whatsoever encumbrances/or claim by us, as a total set-off against the loan taken from you.

As evidence of your entitlement to the above properties, you will execute and be bound by the terms and conditions of the standard sale and purchase agreement applicable for the above project Save and Except that upon your execution, the purchase price shall be deemed fully paid.

Yours faithfully,

(Sign.)
Tan Seng Chai
Director.

At the end of the day, the learned judge granted the orders prayed for by the respondents in their respective applications with costs and ordered that costs be paid out from the assets of the appellant. With regards to the sanction proceedings, the learned judge granted the sanction applied for in relation to the proposed scheme so as to be binding on the appellant and the purchasers subject to the orders granted in favour of the respondents, namely, that the 20 lots purchased by the respective respondents appearing in Schedule B to the proposed scheme as "Settlement Units" be deleted. The appellant appealed.

We had on 26 July 2004 dismissed the appeal with costs and the following are our reasons for doing so.

Before us, learned counsel for the appellant contended that the principal issue is whether the learned judge was justified in reversing the decision made by the liquidators that each of the respondents was not a creditor for the purposes of the proposed scheme. He argued that the impugned decision of the liquidators must be viewed against the following legal principles which are equally applicable whether the liquidators were conducting a proof of debt exercise or in deciding whether a party should be included for the purposes of a scheme of arrangement, namely:

(a) the main duties and obligations of any liquidator in the management of the affairs of an insolvent company is to identify the true creditors of the company;

(b) the onus is on the creditors to prove their debts with sufficient evidence to the satisfaction of the liquidators;

(c) in the event of a challenge to the decision of the liquidators in this regard, the creditors carry the additional burden to show that such a decision was wrong in the sense that the liquidators, given the material before them, could not have reached such a decision.

Counsel pointed out the evidence that was presented by the respondents before the court below was the very evidence that was submitted to the liquidators. Each of the respondents produced purported sale and purchase agreements with the appellant in respect of the 20 lots in issue in these proceedings. The evidence they produced to show that they had paid the purchase price under each of the sale and purchase agreements were essentially as follows:

(a) in respect of the 1st and 2nd respondents and the 7th to the 9th respondents, respectively, the two said letters of undertaking dated 12 July 1995 (reproduced above) issued by the appellant before its liquidation, *viz.*, 10 May 2000 agreeing to set off certain alleged debts from the appellant to these respondents by transferring the various lots in the said development to them;

(b) purported supporting documents comprising, *inter alia*, copies of cheques, payment vouchers and bank-in slips presented by the 7th to the 9th respondents which merely show payments to 3rd parties;

(c) in respect of the 3rd to the 6th respondents, purported credit notes issued by the appellant which these respondents contend were towards the settlement of the purchase price of the various lots from the said development over which they claimed to have purchased.

Counsel argued in the face of what can at best be described as "inconsistent documents", the authenticity of which were in any event open to serious doubt given also the relationship between each of the respondents with a director of the appellant, namely, the said Tan Seng Chai, the respondents have clearly failed to show that they were creditors for the purposes of s. 176 of the Act. Counsel further submitted even assuming that the appellant was indeed indebted to each of the respondents, the fact that each of the sale and purchase agreements was entered into to set off alleged antecedent debts within five years before the appellant was wound up would have rendered void such an arrangement given the provisions of s. 52 of the Bankruptcy Act 1967 particularly when there was no evidence presented by the respondents, the burden of proof being upon them, that the appellant would have otherwise been in the position to pay all its debts without such set off arrangements.

In his submission, learned counsel for the 1st and 2nd respondents insisted that the 1st respondent at all material times is the purchaser of lots PTM 36 and PTM 38 and the 2nd respondent, the purchaser of Lot PTM 39 from the appellant. He stressed that the learned judge ruled that the 1st and 2nd respondents were *bona fide* purchasers and that lots PTM 36, PTM 38 and PTM 39 shall be excluded as "Settlement Units" under the proposed scheme. He submitted that the learned judge has rightfully determined the issue that the 1st and 2nd respondents were *bona fide* purchasers for value based upon the evidence before the court. Further, he has considered the surrounding circumstances of the case and deduced that the 1st and 2nd respondents are in fact and in law *bona fide* purchasers for value.

Counsel pointed out the notice of the court convened meeting dated 12 November 2002 was issued and served upon the 1st and 2nd respondents by the liquidators. In relation to this he submitted that the liquidators have in fact invited or requested the 1st and 2nd respondents to attend the meeting to exercise their rights to vote in favour of the proposed scheme. The 1st and 2nd respondents had voted against the proposed scheme as it did not protect or safeguard their interest. He contended the liquidators by their conduct have in fact tacitly recognised that the 1st and 2nd respondents are *bona fide* purchasers. They were conferred the right to vote and that would be a clear admission on the part of the liquidators that they are *bona fide* purchasers for value. Counsel then stressed the proposed scheme was unfair and unreasonable and does not protect and safeguard their interest as purchasers. He pointed out that the primary purpose of the proposed scheme was to protect the interest of ABMB's claim by way of transfer of the "Settlement Units" plus a cash payment of RM184,790 as full and final settlement of all its claims and as far as it relates to them, it would tantamount to them virtually surrendering

their interest in respect of lots PTM 36, PTM 38 and PTM 39 in favour of ABMB. Counsel submitted the liquidators are not acting in good faith but more in favour of ABMB. It is unwarranted and unreasonable on the part of the liquidators to classify them as disputed purchasers when the liquidators have knowledge of the existence of the sale and purchase agreements which were properly drawn up, executed, stamped and attested by solicitors and the appellant's "letter of undertaking" dated 12 July 1995.

In relation to the liquidators' allegation of a "relationship of sibling" between the said Tan Seng Chai and the 1st and 2nd respondents, counsel argued it is on no relevance to the issue before the court. The liquidators have no evidence to substantiate or justify that allegation. Furthermore, the said Tan Seng Chai was not signatory to the sale and purchase agreements between the appellant and their goodselves. The liquidators have not adduced evidence to show that the sale and purchase agreements contained more favorable terms than the sale and purchase agreements executed by purchasers whose lots do not appear in Schedule B to the proposed scheme as "Settlement Units".

Learned counsel for the 3rd to the 9th respondents contended the liquidators had formulated a rehabilitation scheme with all intent and purpose to "confiscate" the lots purchased by these respondents. He pointed out that on 22 March 1995 the 3rd to the 9th respondents as purchasers entered into 15 sale and purchase agreements with the appellant as vendor in relation to lots PT 155, PT 196, PT 223, PT 238, PT 239, PTI 1, PTI 2, PB 27, PB 28, PTM 60, PTM 61, PTM 62, PTM 66, PTM 67 and PTM 68, ie, exactly four years 10 months 2 days before the winding-up petition was presented against the appellant. At the material time when the sale and purchase agreements were entered into, there is no evidence to show that the appellant was insolvent or unable to meet its obligation. The sale and purchase agreements is evidence of the disposition of the appellant's property pursuant to contracts entered into between the parties. Thus, it is protected by s. 91 of the Evidence Act 1950 and hence s. 52 of the Bankruptcy Act 1967 could not be simply employed to invalidate the said sale and purchase agreements. Section 91 of the Evidence Act 1950 reads:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Counsel then pointed out the appellant have neither disputed the sale and purchase agreements entered into nor raised any fact to cast doubt over its validity. Thus the learned judge was right in ruling that the same are valid transactions. The appellant had by virtue of the said "letter of undertaking" confirmed with the 3rd to the 9th respondents that in consideration of the loans advanced by them, the appellant shall set it off with the purchase price of the respective lots from the advance money which the respondents loaned. This set off arrangement had been unequivocally accepted by the appellant which was reduced into writing contained in that said letter. The acceptance is in accord to s. 91 of Contracts Act 1950. That letter was also supported by the official receipts issued by the appellant bearing the same date. That letter and the receipts are coherent in that both reiterate and reinforce the set-off contra arrangement. The appellant also never disputed the fact that they had approached the respondents for advance monies in order to enable it to meet its preliminary project expenses.

The learned judge found that the 3rd to the 9th respondents are *bona fide* purchasers for value and ruled that the liquidators were wrong in fact and in law in classifying the respondents as disputed purchasers for the purpose of the proposed scheme. He also found, based upon the material before him, the respondents have proved that they had entered into valid sale and purchase agreements before the appellant was wound up.

We cannot find anything erroneous with the findings of the learned judge. The evidence clearly showed that the respondents as purchasers entered into sale and purchase agreements with the appellant to purchase the lots, the subject of these proceedings, listed as "Settlement Units" to the proposed scheme. The appellant issued receipts acknowledging that the respondents had paid 10% of the purchase price for each lot purchased. The appellant further undertook vide the said "letters of undertaking" to transfer the lots identified therein to the respondents free from any encumbrances as a total set-off against loans taken from the respondents. The said "letters of undertaking" further state that upon execution of the sale and purchase agreements the purchase price shall be deemed to have been paid. These letters were signed by the said Tan Seng Chai whom the liquidators alleged had a "relationship of sibling" between the 1st and 2nd respondents. We noted that the liquidators have not substantiated this averment. We further do not see the relevance of this allegation. Section 20(1) of the Act entitled "*Ultra vires* transactions" reads:

> No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

The act of the said Tan Seng Chai in issuing the said "letters of undertaking" cannot be said to be invalid as far as the 1st and 2nd respondents and the 7th to the 9th respondents as purchasers are concerned. Based upon the material before the court, the said Tan Cheng Sai would have the capacity or power to act on behalf of the appellant in respect of the transactions.

We are of the view that the respondents by virtue of the respective sale and purchase agreements and the material before us have proved that they purchased the 20 lots in issue and have given valuable consideration. The respondents have produced receipts issued by the appellant to show that they have paid the 10% deposit required upon execution of the respective agreements. The said "letters of undertaking" issued by the appellant in respect of the lots identified therein clearly spelt out that the appellant unconditionally agree that it "will transfer/ assign the above units of property free of any and whatsoever encumbrances/ or claim by us as a total set off against the loan taken from you". We would agree with the contention of counsel that this is tantamount to an admission by the appellant that they had received valuable consideration from the respondents concerned.

We cannot see anything erroneous in the decision of the learned judge in granting the orders that the liquidators shall exclude the 20 lots in issue from the list of "Settlements Units" whereby they proposed or intended to transfer the same to ABMB with the purpose of settling the appellant's debts for the redemption of the bridging loan. We find that the respondents have given valuable consideration and it would be unfair on the part of the liquidators to exclude them from the proposed scheme. The learned judge found that the respondents have acted in good faith in purchasing the respective lots from the appellant and hence are *bona fide* purchasers. We see no reason to differ from that finding. We would also agree with his finding that s. 293 of the Act pertaining to fraudulent preference and s. 52 of Bankruptcy Act 1967 are not applicable under the circumstances of this case.

On the whole, we find that the sale and purchase agreements entered into between the respondents as purchasers and the appellant as vendor are valid transactions. These agreements were never disputed by the appellant prior to it being wound up. Each agreement was properly stamped and witnessed and attested to by solicitors. There is nothing to show that the respondents have not acted in good faith. In *Official Assignee v. Ngu Ung Yong* [1988] 2 MLJ 204, Chong Siew Fai J (as he then was) in dealing with s. 52 of the Bankruptcy Act said (at p. 266):

> Under the said section 52(1), the onus of proof of the lack of good faith and the lack of valuable consideration is on the *Official Assignee: Official Assignee of the Estate of Cheah Soo Tuan v. Khoo Saw Cheow; Re Anson Cycle & Motor Works, ex parte the Official Assignee.*
>
> The word "purchaser" is to be construed in the ordinary commercial sense and means a person who has given value (*Hance v. Harding*). In order to constitute "a purchaser in good faith" within the meaning of the section, it is sufficient if the purchaser acts in good faith, and it is not necessary that both parties to the transaction should so act (*MacKintosh v. Pogose*).

As it is the liquidators' position that the 20 lots in issue are the subject of sale and purchase agreements the status and validity of which are uncertain, in the light of the above decision, it is for the liquidators to have the same be set aside or have them declared null and void. This, the liquidators have failed to do so. We would agree with the contention of counsel for the respondents that so long as the respondents acted in good faith, there is no requirement for the respondents to ensure that the appellant should so act. The liquidators have not shown that the respondents are not purchasers in good faith or that the transactions were entered into without valuable consideration on the part of the respondents as purchasers and as such simply cannot confiscate their rights as unsecured creditors. The burden of proof as required by s. 52 of the Bankruptcy Act 1967 rests with the liquidators. We are of the view that the liquidators have failed to prove that the transactions were invalid.

For the above reasons, we dismissed this appeal with costs and ordered that the deposit be paid towards the account of taxed costs.

My learned brothers, Mokhtar Sidin JCA and Abdul Wahab Patail J have read the draft and had expressed their agreement thereto.